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Sarimah bt Peri v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO BA-41S-25–04 OF 2018
AHMAD FAIRUZ JC
22 FEBRUARY 2019

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Criminal Law — Appeal — Appeal against conviction and sentence — Appellant found guilty under s 424 of the Penal Code by magistrate and sentenced to two years imprisonment — Dishonest or fraudulent removal or concealment of consideration — Whether ingredients of offence proven — Whether appellant had control over accounts — Whether there was proof that appellant had acted dishonestly or fraudulently — Whether appellant assisted in concealment or removal of property — Whether magistrate could rely on statement under s 112 of the Criminal Procedure Code — Whether magistrate erred when held that prima facie case proven — Criminal Procedure Code ss 112 & 113 — Penal Code s 424

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This was an appeal against the decision of the magistrate who had found the appellant guilty of an offence under s 424 of the Penal Code ('the PC') and sentenced her to two years imprisonment. The facts of the case were that PW1 had transferred a sum of money via cash deposit under the instruction of Fredrick Cheng ('Fredrick') who told PW1 that he was a director at Shell. Fredrick purportedly told PW1 that he would be paid a sum of USD4.25m ('the said sum') after his contract expired however before Fredrick could be paid and the said sum released to him he had to settle his debts with Shell. PW1 claimed that she wanted to help Fredrick settle the said debt only to realise that she had been duped into transferring said monies after doing more than 30 transfers to the account belonging to the appellant. The appellant argued that: (a) the ingredients of s 424 of the PC had not been proven; (b) the appellant had no control over the accounts; (c) there was no proof that the appellant had acted dishonestly or fraudulently; and (d) the appellant had acted under a mistake of fact under s 79 of the PC.

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Held, allowing the appeal:

(1) The magistrate had amended the charge at the end of the prosecution's case after the prosecution applied to the court to do so which was done according to law. However the amended charge refered to 'menyimpan' which s 424 made no mention of. Therefore, the court was of the view that there was an error on the part of the magistrate when she used the

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A term 'menyimpan' in the amended charge. This was tantamount to preferring a charge that did not exist under the law (see paras 10, 12, 18 & 21).

(2) There was also an inconsistent use of the terms by the magistrate which begged the question of what was the actual element being contemplated by the magistrate when she was deciding the case. In considering charges an arbiter must be certain which limb of the charge is to be proven by the prosecution. By interchanging the terms, the magistrate misdirected herself on the exact ingredient to be considered. Such errors could not be cured as it went to the crux of the charge (see para 24).

(3) The reliance on the appellant's statement under s 112 of the Criminal Procedure Code ('the CPC') by the magistrate was a misdirection on her part. The CPC was amended via Act A1304 which introduced s 113, where it expressly stated that no statement made by any person to a police officer in the course of a police investigation made under s 112 of the CPC shall be used in evidence. the magistrate fell into error when she relied on the contents of the s 112 statement of the appellant at the prosecution stage of the trial. The magistrate not only relied on the contents of the said statement but went to impute mens rea on the part of the appellant. This was outside of the permitted ambit of s 113 of the CPC. The magistrate can only consider the evidence as presented by the prosecution. She was not entitled to rely on the contents of a statement devoid of proof (see paras 34 & 39–40).

(4) In order to show that the appellant acted dishonestly, it had to be shown that she had the intention to cause wrongful loss to PW1. There must be foresight on the part of the appellant that what she did (in opening the account) would result in wrongful loss or wrong full gain to someone (see para 46).

(5) The court was of the view that for a successful prosecution under s 424 of the PC in particular if the charge was one that related to assisting the concealment or removal of property, the prosecution must show the overt act by the accused to assist in the concealment or removal of the property. Merely by proving the opening of an account by an individual without more, could not tantamount to him or her assisting the commission of the offence. There must be other evidence available that could show either collusion or active participation on the part of the account holder. In the foregoing, the court was of the firm opinion that the magistrate had erred when she found that the prosecution had established a prima facie case (see paras 55–56 & 58).

[Bahasa Malaysia summary

Ini merupakan satu rayuan terhadap keputusan majistret yang telah mendapati perayu bersalah atas satu kelasahan dibawah s 424 Kanun Keseksaan ('KK')

dan menghukum perayu dengan dua tahun pemenjaraan. Fakta kes adalah bahawa PW1 telah memindahkan sejumlah wang melalui desposit tunai di bawah arahan Fredrick Cheng ('Fredrick') yang memberitahu PW1 bahawa dia merupakan seorang pengarah di Shell. Fredrick kononnya memberitahu PW1 bahawa dia akan dibayar sejumlah USD4.25 juta ('jumlah tersebut') hanya selepas kontraknya luput namun sebelum Fredrick boleh dibayar jumlah tersebut dia perlu pertama sekali melangsaikan hutangnya dengan Shell. PW1 mengatakan bahawa dia hendak membantu Fredrick melangsaikan hutang tersebut hanya untuk mendapati bahawa dia telah ditipu sehingga menyebabkan beliau memindahkan wang tersebut selepas melakukan lebih daripada 30 pindahan ke akau milik perayu. Perayu menghujahkan bahawa: (a) elemen s 424 KK tidak dibuktikan; (b) perayu tiada kawalan terhadap akaun tersebut; (c) tiada keterangan bahawa perayu telah bertindak secara curang atau tipuan; dan (d) perayu telah bertindakan atas satu kesilapan fakta dibawah s 79 KK.

Diputuskan, membenarkan rayuan:

(1) Majistret telah meminda pertuduhan di akhir kes pendakwaan selepas pendakwaan memohon kepada mahkamah untuk berbuat sedemikian yang mana adalah teratur di sisi undang-undang. Namun, pertuduhan pindaan merujuk kepada 'menyimpan' yang mana s 424 tidak membuat apa-apa rujukan kepadanya. Oleh itu, mahkamah berpendapat bahawa wujud kekhilafan di pihak majistret apabila dia menggunakan terma 'menyimpan' dalam pertuduhan pindaan. Ini terjumlah kepada membuat pertuduhan yang tidak wujud di sisi undang-undang (lihat perenggan 10, 12, 18, & 21).

(2) Wujud juga penggunaan terma yang tidak konsisten oleh majistret yang menimbulkan personalan apakah elemen sebenar yang dipertimbangkan oleh majistret semasa beliau memutuskan kes tersebut. Dalam menimbangkan pertuduhan, seorang penentu harus jelas bahagian mana pertuduhan yang perlu dibuktikan oleh pendakwaan. Dengan mencapuradukan terma tersebut, majistret telah tersalah arah akan ingredien sebenar yang perlu dipertimbangkan. Kekhilafan sedemikian tidak boleh dipulihkan kerana ianya pergi kepada asas pertuduhan tersebut (lihat perenggan 24).

(3) Kebergantungan kepada penyataan perayu dibawah s 112 Kanun Tatacara Jenayah ('KTJ') oleh majistret merupakan satu salah arah di pihaknya. KTJ yang dipinda melalui Akta A1304 yang memperkenalkan s 113, yang mana ianya dengan jelas menyatakan bahawa tiada pengataan yang dibuat oleh mana-mana orang kepada seorang pegawai polis dalam satu siasatan polis yang dibuat dibawah s 112 KTJ, boleh digunakan sebagai keterangan. Majistret terkhilaf apabila beliau bergantung kepada kandungan penyataan s 112 perayu sewaktu kes pendakwaan. Majistret

tersebut bukan sahaja bergantung kepada kandungan pengataan tersebut tetapi juga mengatakan wujudnya mens rea di pihak perayu. Ini adalah melampaui apa yang dibenarkan oleh s 113 KTJ. Majistret tersebut hanya boleh menimbangkan keterangan yang dipersembahkan oleh pendakwaan. Beliau tidak berhak untuk bergantung kepada kandungan satu pengataan yang tidak dibuktikan (lihat perenggan 34 & 39–40).

(4) Untuk menunjukan bahawa perayu telah bertindak secara curang, adalah perlu dibuktikan bahawa perayu mempunyai niat untuk menyebabkan kerugian salah kepada PW1. Perlu wujud pandangan jauh di pihak perayu bahawa apa yang dia lakukan (semasa membuka akaun) akan menyebabkan kerugian salah atau kekayaan salah kepada seseorang (lihat perenggan 46).

(5) Mahkamah berpendapat bahawa untuk satu pendakwaan yang berjaya di bawah s 424 KK secara khususnya sekiranya pertuduhan berkaitan dengan membantu menyembunyikan atau mengeluarkan harta, pendakwaan perlu menunjukan bahawa tindakan terang-terangan oleh tertuduh untuk membantu dengan penyelindungan atau pengeluaran harta tersebut. Hanya dengan membuktikan pembukaan satu akaun oleh seorang individu tanpa apa-apa yang lanjut, tidak terjumlah kepadanya membantu pelakuan kesalahan tersebut. Perlu wujud ketereangan lain yang boleh menunjuk sama ada pakatan sulit atau penglibatan aktif dipihak pemegang akaun. Berdasarkan perkara diatas, mahkamah berpendapat bahawa majistret tersebut terkhilaf apabila beliau mendapati bahawa pendakwaan telah membuktikan satu kes prima facie (lihat perenggan 55–56 & 58).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)
Attan bin Abdul Gani v PP [1970] 2 MLJ 143b (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 321, FC (refd)
Emmanuel Yaw Teiku v PP [2006] 5 MLJ 209; [2006] 3 CLJ 597, HC (refd)
Mohamad bin Deraman v PP [2011] 3 MLJ 289, CA (refd)
PP v Adetunji Adeleye Sule [1993] 2 MLJ 70, SC (refd)
PP v Ahmad Puteh & Ors [1987] 1 CLJ 488 (refd)
PP v Hairul Din bin Zainal Abidin [2001] 6 MLJ 146; [2001] 6 CLJ 480, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 4 CLJ 2086, SC (refd)
PP v Ma' Arif [1969] 2 MLJ 65 (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Rex v Kavena Ismail Sahib [1937] 1 MLJ 242 (distd)

Tan Boon Kean v PP [1995] 3 MLJ 514, FC (refd)
Woolmington v Director of Public Prosecutions [1935] All ER Rep 1; [1935] AC 462, HL (refd)
Yap Sing Hock & Anor v PP [1992] 2 MLJ 714; [1992] 4 CLJ 1950, SC (refd)

Legislation referred to

Criminal Procedure Code ss 112, 113, 113(3), 158
Evidence Act 1950 ss 27, 32(i), (j), 79
Penal Code ss 24, 79, 424

A Ravi Kumar (Ravi & Co) for the appellant.
Rizal Azani (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the respondent.

Ahmad Fairuz JC:

INTRODUCTION

[1] The appellant was charged under s 424 of the Penal Code. At the magistrate's court, after a full trial, the magistrate found the appellant guilty and went on to sentence the appellant to two years imprisonment. The appellant then appealed to this court and upon considering the submissions and evidence available in the records of appeal, this court allowed the appeal. The appellant was acquitted and discharged. The public prosecutor filed an appeal against the decision. This is the grounds of judgment of this court.

THE CHARGE

Original charge:

> Bahawa kamu pada 25/06/2015 bertempat di No 40 Jalan Raja Nala 18, Taman Saujana Bukit Kapar, Pekan Kapar 42200 Kapar, di dalam Daerah Klang, di dalam Negeri Selangor, telah menipu Koo Sai Lee (No KPT: 761007145402) untuk memasukkan wang bertujuan menolong membayar untuk menamatkan kerja kontrak di Shell (Oil & Gas), Miri dan dengan itu kamu dengan secara tidak jujur dan secara fraud telah mendorong dia menyerahkan wang kepada kamu berjumlah RM251,990.00 secara memasukkan wang ke dalam akaun bank milik kamu yang mana dia tidak akan menyerahkan wang tersebut kepada kamu sekiranya tidak diperdayakan sedemikian, dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 424 Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama.

Amended charge:

> Bahawa kamu pada 15/3/2016 hingga 30/3/2016 bertempat di No 40, Jalan Raja Nala 18, Taman Saujana Bukit Kapar, Pekan Kapar, 42200 Kapar di dalam Daerah

Klang di dalam Negeri Selangor dengan secara curangnya telah menolong menyimpan wang milik Koo Sai Lee (No Kad Pengenalan: 761007-14-5402) berjumlah RM251,990.00 ke dalam akaun CIMB milik kamu yang bernombor 7060603268 yang mana kamu mengetahui wang tersebut bukanlah milik kamu. Dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 424 Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama.

THE PROSECUTION'S CASE

[2] The prosecution's case anchored on PW1, the complainant in this case. She informed the court that she transferred RM259,990 via cash deposits after she was asked to do so by one Fredrick Cheng ('Fredrick') whom she got acquainted via Facebook. It was in evidence that PW1 was told by the said Fredrick that he was a Director at Shell, an oil and gas company. Fredrick told PW1 that he will be paid a sum of USD4.25m after his contract expires with Shell. This was evidenced by a certificate of deposit ('P2') purportedly issued by Alliance Bank Malaysia Bhd. PW1 was also shown a bank document purportedly from one Alley Access Bank. It showed a balance of USD4.25m. This was purportedly the sum that was transferred by Shell into Fredrick's account. However, before Fredrick could be paid and the said sums released to him, he had to settle his debts with Shell. PW1 claimed that she wanted to help Fredrick as the latter was having some problems in settling the said debts. She only realised that she was duped into transferring such monies after doing more than 30 transfers to the account of one Sarimah Peri (subsequently identified as belonging to the appellant). Fredrick informed Sarimah Peri was the person in charge for all expatriate accounts in Shell. It was told to PW1 that if the payment was made to a personal account of a trusted person of Shell, the debts would be settled faster. PW1 then made the transfers into the account provided by the said Fredrick. It was after transferring the said amounts that she verified with Alliance Bank on the authenticity of P2 only to find that the bank did not issue any such a document. She then reported to the police which culminated in P1 being filed. During cross-examination, PW1 was confronted with an excerpt of messages which PW1 admitted were exchanges between her and Fredrick. She admitted that they had struck a friendship but denied that she was promised anything in return for the help that she would render. She admitted that she never met Fredrick and the persons he mentioned introduced to her.

[3] The second prosecution witness was a CIMB Bank officer who testified that the accounts in which the monies were deposited into belonged to the appellant. From the records, she admitted that the account could have been operated by persons other than the appellant. The third witness for the prosecution was the investigating officer ('IO'). His evidence explained the subsequent actions taken by him after the report P1 was lodged. It was admitted by the IO that the case involved fictitious characters. The IO was

convinced that Fredrick Cheng did not exist. The IO also admitted that there was no communication between Fredrick Cheng and the appellant. The IO explained that this was an African scam case where all characters were fictitious.

THE DEFENCE CASE

[4] The defence called three witnesses. The appellant produced a witness statement that explained at length on how she got acquainted with a person by the name of Frank Ben. The witness statement was marked as D14. In essence, she said that Frank Ben had asked her to open several bank accounts for his use. She received payments of RM500 for purposes of opening the said accounts. She also said that initially Frank Ben had promised to come to Sarawak to collect the cards issued by the banks but instead, a Malay lady by the name of Asmah came to collect the cards sometime in February 2016. She had never met the said Frank Ben and neither has she met Fredrick Cheng. She has also not met the complainant PW1 until after her arrest. DW2 was an immigration officer who confirmed that the appellant had not travelled out of Sarawak between 1–31 March 2016. DW3 was the appellant's son in law. He had produced excerpts of conversations between the appellant and the said Frank Ben and was marked as IDD20.

THE APPEAL

[5] Before this court, counsel for the appellant advanced several arguments. Firstly, it was argued that the ingredients of s 424 have not been proven by the prosecution. Secondly, the appellant had no control over the accounts. Thirdly, it was argued that the there was no proof that the appellant had acted dishonestly or fraudulently. Fourthly, that the appellant had acted under a mistake of fact under s 79 of the Penal Code. In closing, the two years imprisonment was also submitted as excessive.

ANALYSIS BY THIS COURT

[6] It is a principle of law that when a case comes before an appellate court, the said matter takes the form of a continuation of a trial and it is open to the appellate court to order or determine if the various findings of the trial court are correct (see *Public Prosecutor v Ma' Arif* [1969] 2 MLJ 65; *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; *Mohamad bin Deraman v Public Prosecutor* [2011] 3 MLJ 289).

[7] As such it is incumbent upon this court to examine the facts presented at trial to see if there was sufficient evidence established by the prosecution to establish a prima facie case.

A SECTION 424 OF THE PENAL CODE

[8] *Vohrah and Hamid on the Malaysian Penal Code: Commentaries, Cases and Sample Charges*, Printworks Publishing 2006, provides that the elements required to be proven by the prosecution are as follows:

B

424 Dishonest or fraudulent removal or concealment of property

Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled,

C shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both.

Commentary

This section prescribes the punishment for dishonest or fraudulent concealment or

D removal of any property.

GUIDE TO PRACTICE AND PROCEDURE PRACTICE

The prosecution has to prove the following:

E 1. That the accused —

(a) concealed or removed any property; or

(b) assisted in its concealment or removal; or

(c) released any demand or claim to which he was entitled.

F 2. That he did so dishonestly or fraudulently.

ANALYSIS BY THE MAGISTRATE

G **[9]** Given that the magistrate had found the appellant guilty as per the amended charge, it is pertinent to examine how she had arrived at the said finding.

[10] The magistrate had at length justified her actions in amending the

H charge at the end of the prosecution case. This was done after the prosecution applied to the court to do so. This court had perused the steps taken by the magistrate. The amendment and the subsequent action by the magistrate to read the charge and allow the recall of witnesses is consistent with s 158 of the CPC. It was according to law.

I **[11]** The magistrate had amended the charge to read as:

Bahawa kamu pada 15/3/2016 hingga 30/3/2016 bertempat di No 40, Jalan Raja Nala 18, Taman Saujana Bukit Kapar, Pekan Kapar, 42200 Kapar di dalam Daerah Klang di dalam Negeri Selangor dengan secara curangnya telah menolong

menyimpan wang milik Koo Sai Lee (No Kad Pengenalan: 761007-14-5402) berjumlah RM251,990.00 ke dalam akaun CIMB milik kamu yang bernombor 7060603268 yang mana kamu mengetahui wang tersebut bukanlah milik kamu. Dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 424 Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama.

[12] It can be seen that the charge refers to 'menyimpan'. The elements of s 424 makes no mention of 'menyimpan'. The dictionary translation of 'menyimpan' according to the *Dewan Bahasa dan Pustaka Dictionary* translates it to be:

Definisi: 1 menaruh sesuatu di tempat yg selamat supaya tidak hilang dsb: Dia ~ kain bajunya di dlm almari. 2 mengemaskan sesuatu supaya tersusun atau teratur semula: Selepas puas bermain, Adli ~ barang-barang permainannya. 3 memegang (rahsia dsb) teguh-teguh; merahsiakan: Dia memang tidak dpt ~ rahsia. ~ hati memendam atau menaruh rasa suka, cinta dsb terhadap seseorang secara diam-diam. (*Kamus Pelajar* Edisi Kedua)

[13] When translated to English, 'simpan' according to the *Kamus Dwibahasa Oxford Fajar* (5th Ed) (Melayu ke Inggeris) defines 'simpan' as:

Keep; remain or cause to remain in a specified state or position; put aside for a future time.

[14] *Words and Phrases and Maxims Legally Defined* (Vol 10, LexisNexis, 2012) defines keep as follows:

To hold, to retain in one's power or possession, not to lose or part with, to preserve to retain: to preserve in the same state or tenor; to maintain or carry on; conduct or manage, to have the control and management, as for example, to have the control and management of places where liquors are sold, of bawdy-houses, of gambling establishments etc, *to have in possession, use care or custody, hence to use and enjoy;* to maintain, support as in a prison, or asylum; so also as applied to animals, to tend to feed to pasture, to supply with necessaries of life. As an intransitive verb, to remain sound, sweet, fresh or the like; (as) Meat will keep for two days.

[15] Conceal on the other hand, is defined in the *Oxford Dictionary* as:

keep secret (from); not allow to be seen or noticed.

[16] *Words and Phrases and Maxims Legally Defined* (Vol 10, LexisNexis, 2012) defines conceal as:

TO CONCEAL, HIDE, SECRET. Concealing has simply the idea of not letting come to observation; hiding that of putting under cover; secreting that of setting at a distance or in unfrequented place; whatever is not seen is concealed, but whatever is hidden or secreted is intentionally put out of sight. A thief conceals himself

behind a hedge; he hides his treasures in the earth; he secrets what he has stolen under his Cloak.

CONCEALED DANGER. A concealed danger has been defined to be danger which is not known or obvious to the licensee using reasonable care.

[17] Augustine Paul J (then FCJ) in *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146; [2001] 6 CLJ 480 referred to the *Websters' New World Dictionary* (3rd Ed) when seeking the definition of 'keep'. It was quoted to mean as follows:

to take care of, or have and take care or charge of; specific: (a) to protect; guard; defend (b) to look after; watch over; tend.

[18] This court is of the view that there was an error on the part of the magistrate when she used the term 'menyimpan' in the amended charge.

[19] In the case *Public Prosecutor v Ahmad Puteh & Ors* [1987] 1 CLJ 488, Lim Beng Choon J relied on the dictionary meaning to find a definition of the word 'conceal' and went on to say — 'The meaning of 'conceal' as defined in the *Shorter Oxford Dictionary* is 'to keep from the knowledge or observation of others' or 'to put or keep out of sight or notice, to hide' (see *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514).

[20] The definition of keep and conceal are nowhere similar. To conceal something would connote an intention to deprive someone of the whereabouts of the said property. It is akin to hiding. This is in contrast to the mere use of the word keep. In a criminal charge, the accused has the right to be given notice of what the charge is against him. Any ambiguity must be resolved in the accused's favour.

[21] As such, by the magistrate amending the charge upon the request of the prosecution to one as stated above tantamount to the magistrate preferring a charge that does not exist under the law. There is no such ingredient of keeping under s 424 of the Penal Code.

[22] Throughout the decision of the magistrate, she had interchangeably used the terms 'menyembunyikan', 'memindahkan' and 'mengalihkan' in her grounds of judgment. This can be seen at para 22 where it was stated as:

Tertuduh telah menyembunyikan harta iaitu wang milik pengadu dalam akaun CIMB miliknya dan membantu dalam *menyembunyikan dan memindahkan* wang tersebut secara tidak jujur atau dengan kata lain membantu menipu Pengadu.

[23] The magistrate had used the term 'mengalihkan' in para 29 where it was

stated as:

> Saya sekali lagi menegaskan bahawa pertuduhan kes ini adalah di bawah Seksyen 424 KK. Tertuduh telah dituduh kerana membantu *mengalihkan* wang Pengadu ke dalam akaun miliknya dan Tertuduh dengan tidak jujur melakukan perbuatan ini.

[24] The inconsistent use of the terms by the magistrate begs the question of what was the actual element that was being contemplated by the magistrate when she was deciding the case. In considering charges, an arbiter must be certain which limb of the charge is to be proven by the prosecution. By interchanging the terms, the magistrate misdirected herself on the exact ingredient to be considered. Such errors cannot be cured as it went to the crux of the charge.

[25] Even if the magistrate had rightly used the term 'mengalihkan' which in effect means removal of the said monies, it resulted in her considering an element that was not in the amended charge. Granted, s 424 does provide for the actus reus of removal, never the less, what is incumbent on the magistrate is for her to consider only the elements that are in the charge that she herself had inserted. There was no discussion on 'menyimpan' (keep).

[26] A conclusion that can be drawn from the above analysis is that the magistrate had firstly, amended the charge to include an element that is not within the ambit of the law and secondly, considered elements of the charge interchangeably without determining the exact element as stated in the charge.

THE RELIANCE ON THE APPELLANT'S STATEMENT UNDER S 112 OF THE CPC TO THE POLICE ('IDD13')

[27] It is trite that it behoves that defence to state its case as early as possible (see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2086). It is for that reason that the appellant could have introduced the s 112 of the Criminal Procedure Code ('the CPC') statement by the appellant (IDD13) to the police during investigations.

[28] It is the finding of this court that the magistrate had considered the contents of the said statement in determining the case against the appellant.

[29] For ease of reference, the relevant portion of the magistrate's judgment is reproduced as follows:

> [22] Peguambela juga turut membangkitkan isu bahawa penama Fredrick Cheng merupakan orang yang bertanggungjawab menipu pengadu dan bukannya tertuduh, namun berdasarkan intipati pertuduhan ini (di bawah s 424 KK) yang

mana tertuduh telah menyembunyikan harta iaitu wang milik pengadu dalam akaun simpanan CIMB miliknya dan dia membantu dalam menyembunyikan dan memindahkan wang tersebut secara tidak jujur atau dengan kata lain membantu menipu pengadu.

[23] Walaupun peguambela menegaskan bahawa tertuduh tidak pernah mendorong pengadu untuk membuat apa-apa kemasukan wang ke dalam akaun tertuduh. *Saya dengan ini merujuk kepada rakaman percakapan beramaran tertuduh (IDD13).*

[24] *Dalam rakaman percakapan itu, tertuduh menceritakan bahawa dia telah berkenalan dengan Frank Ben melalui laman Facebook pada bulan November 2015, tertuduh tidak pernah bertemu dengan Frank Ben dan hanya berhubung melalui Facebook dan telefon. Frank Ben ada meminta wang daripada tertuduh bagi membantunya kerana telah ditahan di KLIA. Oleh kerana tertuduh tidak mempunyai wang, Frank Ben telah meminta tertuduh untuk membuka satu akaun bank bagi tujuan wang dimasukkan bagi membantu Frank Ben. Tertuduh bersetuju untuk menolong Frank Ben dan telah menerima wang sebanyak RM750 yang dimasukkan ke dalam akaun tertuduh.*

[25] Tertuduh kemudiannya telah membuka tiga akaun bank (CIMB, RHB dan Hong Leong) di Malaysia atas nama tertuduh. Tertuduh telah membuka akaun CIMB (nombor akaun 7060603268) di CIMB Asajaya, Sarawak. Tertuduh mengakui telah menyerahkan kad ATM beserta nombor pin kepada seorang perempuan melayu berasal daripada Selangor. Tertuduh hanya mengetahui mengenai kemasukan wang pengadu setelah dia ditahan oleh pihak polis pada 5 April 2016.

[26] *Berdasarkan rakaman percakapan ini (IDD13) jelas menunjukkan tertuduh telah menerima wang daripada Frank Ben untuk membuka akaun bank bagi tujuan kemasukan wang dan jelas juga bahawa tertuduh mengetahui mengenai akaunnya akan digunakan oleh individu lain dan tindakan menyerahkan kad ATM kepada penama Asma juga adalah dalam pengetahuan dan kerelaan tertuduh atas niat membantu Frank Ben. Oleh yang demikian saya berpendapat elemen pertuduhan s 424 KTJ adalah dipenuhi oleh pihak pendakwaan kerana tertuduh sedar apa yang dilakukan olehnya dengan menerima wang untuk membuka akaun serta menyerahkan kad ATM setelah akaun dibuka. Ada kemungkinan tertuduh menerima habuan.*

[27] *Namun menerima habuan atau tidak ianya bukanlah satu elemen yang perlu dipenuhi pihak pendakwaan kerana dalam kes ini, perbuatan tertuduh membuka akaun bank dengan duit yang diberikan oleh Frank Ben jelas menunjukkan bahawa elemen kedua iaitu tertuduh melakukan dengan cara tidak jujur atau penipuan dipenuhi oleh pihak pendakwaan. Jika tertuduh berniat jujur sudah semestinya dia tidak akan membuka tiga akaun dengan menggunakan wang individu yang hanya dikenali melalui social media dan dia juga semestinya tidak akan sesenangnya menyerahkan kad ATM beserta nombor pin kepada orang yang tidak dikenali. Saya berpendapat segala tindakan tertuduh ini berdasarkan pengakuan dalam IDD13 ini jelas menunjukkan tertuduh sedar akan perbuatannya ini dan dia tidak didorong oleh mana-mana pihak.*

[28] Peguambela juga membangkitkan isu bahawa pihak polis sepatutnya meminta

CCTV daripada pihak bank bagi membuktikan bahawa bukan tertuduh yang mengeluarkan duit berjumlah RM251,990 melalui ATM. Peguambela juga turut membangkitkan bahawa pada tarikh 6 April 2016 (berdasarkan eksh P8 — ms 2) terdapat pengeluaran wang dan semasa itu tertuduh ada dalam tahanan pihak polis.

[29] Saya sekali lagi menegaskan bahawa pertuduhan kes ini adalah di bawah s 424 KK. Tertuduh telah dituduh kerana membantu mengalihkan wang pengadu ke dalam akaun miliknya dan tertuduh dengan tidak jujur melakukan perbuatan ini. Bukan menjadi elemen di bawah s 424 KK untuk membuktikan bahawa tertuduh yang mengeluarkan kesemua wang-wang itu.

[30] Saya merujuk juga kepada keterangan SP2 yang mengatakan wang ada kemungkinan dikeluarkan oleh pihak lain atau oleh tertuduh sendiri melalui ATM atau online transfer. SP2 mengatakan juga walaupun dalam tahanan polis ada kemungkinan duit boleh dikeluarkan oleh tertuduh. Akaun tertuduh hanya ditutup oleh tertuduh setelah tertuduh telah ditangkap oleh pihak polis. *Walaupun tertuduh tidak berada di Semenanjung Malaysia — (sepertimana dokumen D 12 — pengesahan rekod maklumat/pergerakan keluar masuk tertuduh) berdasarkan dokumen bank dan slip transaksi pengadu kemasukan wang tetap berlaku ke dalam akaun tertuduh. Jika benar akaun tertuduh digunakan oleh orang lain, memandangkan tertuduh berada di Sarawak dan pengadu berada di Klang, tindakan OKT sepertimana dalam IDD13 — rakaman percakapan tertuduh, tertuduh tahu dan sedar setiap tindakannya.*

[31] Saya juga ingin merujuk kepada peruntukan ss 24 dan 23 KK iaitu:

> Section 24 — Dishonestly
>
> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.
>
> Explanation — In relation to the offence of criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or to deceive any person.
>
> Section 23 — Wrongful gain and wrongful loss
>
> 'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.
>
> 'Wrongful loss' — Is the loss by unlawful means of property to which the person losing it is legally entitled.
>
> A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property.

[32] Berdasarkan kes di hadapan saya ini peruntukan ss 24 dan 23 KK ini merujuk kepada perbuatan tertuduh dalam kes ini. *Tertuduh telah melakukan secara tidak jujur atau penipuan, tertuduh telah membantu menyimpan RM251,990. Pengetahuan atau niat tertuduh dapat dibuktikan melalui perbuatan tertuduh itu sendiri. Sepertimana yang saya nyatakan setelah peguambela menggunakan rakaman*

percakapan tertuduh — IDD13, ianya jelas menunjukkan bahawa tertuduh mengenai pengetahuan dan menerima wang daripada individu untuk membuka akaun. Tujuan tertuduh membuka tiga akaun ini adalah atas arahan individu dan tertuduh telah rela hati berbuat demikian malah turut bersetuju menyerahkan kad ATM kepada individu yang kononnya tidak dia kenali.

[30] It was upon the reliance on IDD13 that the magistrate concluded that a prima facie case had been proven by the prosecution at the end of the prosecution case.

[31] The magistrate referred to specific points in the statement to conclude that the appellant had acted in a manner that suggested the appellant had the necessary intention to commit the crime (see para 32).

[32] The magistrate went on to conclude that the appellant had received payments to open the account. It also was her finding that appellant voluntarily opened the account based on the instructions of an individual. The magistrate also relied on IDD13 to arrive at a finding that the appellant had given the ATM card to an unknown person (see para 32).

[33] It was based upon the reliance of IDD13 too that the magistrate had concluded that the prosecution had established a prima facie case. However, none of the prosecution witnesses (PW1 and PW2) said anything that was stated in IDD13.

[34] The reliance on the s 112 statement of the appellant by the magistrate was a misdirection on her part. The CPC was amended via Act A1304 which introduced s 113, where it expressly states that no statement made by any person to a police officer in the course of a police investigation made under s 112 of the CPC shall be used in evidence.

[35] The only exception when the statement is permitted to be used in court is when it is used:

(a) to impeach the credit of the person who gave the statement;

(b) in the case of an accused, to support of his evidence in support of his defence;

(c) in relation to an identification parade;

(d) to admit information leading to discovery under s 27 of the Evidence Act 1950;

(e) to admit statements of persons under s 32(i) and (j) of the Evidence Act 1950; and

(f) as evidence against a person who is charged with any offence in relation to the making of the statement or the content of the same, the said statement shall be used as evidence.

The above essentially sums up the provision of s 113 of the CPC on when the said statement can be used.

[36] In the context of the current appeal, s 113 of the CPC allows the appellant to introduce IDD13. For convenience, s 113(3) is reproduced as follows:

> s 113(3) Where the accused had made a statement during the course of a police investigation, such statement may be admitted in evidence in support of his defence during the course of the trial.

[37] The development of the usage of statements recorded from an accused person under s 113 of the CPC ('cautioned statements') prior to its current form today, was discussed in the Supreme Court case of *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70. The apex court discussed cases and explained the extent of the use of a cautioned statement made by an accused person. Edgar Joseph Jr SCJ in delivering the decision explained as follows:

> Having said that, we would add that if, and when, the respondent gives evidence to the same effect as his cautioned statement, *he is entitled to take advantage of it and to point out that it is consistent with his evidence.* Furthermore, as was rightly pointed out in *R v Donaldson* 4, a purely exculpatory statement made by a defendant out of court '*is evidence at the trial in that it is evidence that the defendant made the statement and of his reaction which is part of the general picture which the jury have to consider but it is not evidence of the facts stated*'. It follows, as the court did in fact hold in Donaldson 4, that it is a misdirection to say that anything which a defendant may have said in his out of court statement is not evidence in the case save in so far as it may consist of an admission.
>
> To the same effect is *R v McCarthy* (GJ) 5, in which the trial judge had refused to admit oral and written self-exculpatory statements made out of court by the accused to the police on the ground that they were self-serving. The accused had told the police at the time of making the statements that they were at liberty to check his movements if they so wished. It was held, on appeal, that that was a misdirection. Lawton LJ in delivering the judgment of the Court of Appeal said this at p 145:
>
> > He (counsel for the respondent) pointed out that although the details were not evidence of the, *the reaction of McCarthy when questioned by the police officer at the beginning of the interview was something which the jury could properly take into account as having some relevance to the genuineness of the defence of alibi*. In our judgment (counsel) was right.
> >
> > One of the best pieces of evidence that an innocent man can produce is his reaction to an accusation to crime. *If he has been told, as the respondent was told, that he was suspected of having committed a particular crime at a particular place*

> *and he says at once, 'That cannot be right, because I was elsewhere' and gives details of where he was, that is something which the jury can take into account.* (Emphasis added.)

[38] Hence, the appellant was entitled to introduce the statement as a basis to introduce her defence as early as possible, to show reaction or basis for action (in opening the account) upon being confronted by the police during investigation. More so, it was permitted under s 113(3) of the CPC.

[39] It is based on the above principles that this court is of the opinion that the magistrate fell into error when she relied on the contents of the s 112 statement of the appellant at the prosecution stage of the trial. The magistrate not only relied on the contents of the said statement but went to impute mens rea on the part of the appellant. This was outside of the permitted ambit of s 113 of the CPC.

[40] The magistrate can only consider the evidence as presented by the prosecution. She is not entitled to rely on the contents of a statement devoid of proof. It is trite that the duty to prove a case in a criminal trial rest solely with the prosecution and remains with the prosecution (see *Woolmington v Director of Public Prosecutions* [1935] All ER Rep 1; [1935] AC 462). The only exception is when there is a reverse onus clause or presumption of law that operates (*Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b).

[41] If the magistrate had applied the correct law with regards to the use of accused person statements, she would not have taken into consideration the factual averments of the appellant in the said statement.

[42] Sifting through the evidence, if the contents of IDD13 is disregarded, on the facts, the prosecution is only left with the evidence of PW1 and PW2. As mentioned above, except for the mention that PW1 had paid into the account of one 'Sarimah Peri', there is no other evidence that can establish the appellant's role in the commission of the crime. There was failure to show how the appellant had assisted in the commission of the offence.

[43] On the element of 'dishonestly', resort must be had to s 24 of the Penal Code. The definition reads as follows:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.

[44] Therefore, the essential thing to be proven in cases under s 424 of the

Penal Code is whether the accused is actuated by the intention to cause the wrongful loss or wrongful gain which will in turn show that he or she acted dishonestly.

[45] In the germane decision of the Supreme Court in *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714; [1992] 4 CLJ 1950, the apex court discussed the term dishonestly in s 24 of the Penal Code. It also went on to discuss the meaning of intention. It held as follows:

> *Intention, at present, has acquired a special meaning as follows.*
>
> *Intention means that a man intends to commit the offence or do the forbidden act as prescribed by law that is described by law, If at or before time of the commission of the offence or the doing of the forbidden act, an accused person has foresight,(that is knows in advance) that his conduct will lead to the commission of the offence or the doing of the forbidden act as described or prescribed by law, irrespective of whether he knows it is such an offence or such a forbidden act, so described or as prescribed by law and he desires the commission of such an offence or doing of such a forbidden act.* (Emphasis added.)

[46] Going back to the current appeal, in order to show that the appellant acted dishonestly, it had to be shown that she had the intention to cause wrongful loss to PW1 as outlined in *Yap Sing Hock*. There must be foresight on the part of the appellant that what she did (in opening the account) will result in wrongful loss or wrong full gain to someone.

[47] Intention however is not easily proven. Richard Malanjum FCJ (now CJ) in *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209; [2006] 3 CLJ 597 held as follows:

> *It should be borne in mind that proof of intention or knowledge is generally inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself.* This difficulty had been acknowledged in the case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 when Thomson J said this (at p 239):
>
> > Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[48] It is therefore, the duty of the prosecution to prove form available evidence, the acts of the appellant to enable an inference of such dishonest intention. Unfortunately in the current appeal, the evidence of PW1 and PW2 did not even show a tinge of such evidence to enable this court to make any inference of dishonest intent.

A OTHER FACTUAL CONSIDERATIONS

[49] The charge had stated that the offence took place in Klang between the dates of 15–30 March 2016. However, nowhere in the evidence was it shown by the prosecution how the appellant had assisted in the commission of the offence on the said days but for the fact that those days relate to the dates in which PW1 deposited the said monies into the appellant's account.

[50] If the case of the prosecution intended implicate the appellant because she had opened the CIMB account on 28 January 2016, certainly, it cannot mean that there is an imputation of guilt proven by the prosecution merely by the act of PW1 depositing the said monies into the account. The operative act that needs to be proven per the ingredients of the offence in s 424 is the assistance in concealing or removing the property. This however, this was not proven by the prosecution.

[51] What was presented by PW1 was only with regards a complaint by her to say that she was duped into transferring the monies into the account of a person named Sarimah Peri. It is the view of this court that by the mere mention of the name of the appellant and the use of the account of the appellant, cannot automatically mean that the appellant had assisted in the concealment or removal of the monies. Unless there is a presumption, the imputation of assisting in such a concealment or removal property without proof, must fail.

[52] It is perhaps instructive for this court to highlight the early case of *Rex v Kavena Ismail Sahib* [1937] 1 MLJ 242 on how s 424 of the Penal Code was applied. Terriell AG, CJ in delivering the guidance held as follows:

> The only point of substance in the appeal was that s 405 of the Penal Code is not applicable to the facts as proved. The section reads:
>
> > Whoever being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use such property etc.
>
> Now the mortgage of a tongkang is in essence more akin to an FMS charge of land than to an English mortgage, where the legal estate is transferred to the mortgagee. Under the Merchant Shipping Acts the mortgagor of a tongkang remains the owner for the purpose of the Acts. All that the mortgagee acquires are certain rights, such as a power of sale, and a right under certain circumstances to take possession. The mortgagee's rights are certainly rights of property, but they are incorporeal rights. They are in no sense movable or corporeal property. There is no definition of 'property', as distinct from movable property which is defined in s 22 of the Penal Code but in the opinion of the court, 'property' for the purpose of s 405 of the Penal Code must be something tangible, and a mere incorporeal right does not fall within the purview of the section. There is the further difficulty that even if such

incorporeal right could be the subject of criminal breach of trust, the mortgagee's rights were never 'entrusted' to the appellant, and without such an 'entrustment' a conviction under s 405 cannot stand. A

It is clear however that the verdict of the jury involved a finding that the Appellant made away with the two tongkangs by altering them and registering them in other persons' names with a view to defrauding the complainant. *The offence proved seems clearly to fall under s 424 of the Penal Code in that the Appellant was found to have dishonestly or fraudulently concealed or removed the two tongkangs in question.* Sections 176 and 177 sub-s 1 of the Criminal Procedure Code are accordingly applicable, and it was open to the jury to convict the Appellant of the offence which he is shown to have committed although he was not charged with it. B C

[53] *Rex v Kavena Ismail Sahib* is a classic case of how s 424 of the Penal Code can best be used. It is in stark contrast to the facts in this current appeal.

THE FINDINGS OF THIS COURT D

[54] The learned DPP had assiduously argued that the prosecution had successfully proven its case and that there was no error by the magistrate when she called for the appellant to enter her defence and ultimately in finding the appellant guilty. With due respect, this court is unable to agree with the DPP. The prosecution cannot rely in the mere statement of PW1 to implicate the appellant. Apart from the account belonging to the appellant, there were no other evidence produced by the prosecution that could show a prima facie case of the appellant assisting in either concealing or removing the said monies. E F

[55] This court is of the view that for a successful prosecution under s 424 of the Penal Code in particular if the charge is one that relates to assisting the concealment or removal of property, the prosecution must show the overt act by the accused to assist in the concealment or removal of the property. G

[56] Merely by proving the opening of an account by an individual without more, cannot tantamount to him or her assisting the commission of the offence. There must be other evidence available that can show either collusion or active participation on the part of the account holder. H

CONCLUSION

[57] This court reiterates the concern over how the charge was preferred against the appellant and how the magistrate had gone on to analyse the ingredients of the charge. This court had also raised the concern of how the s 112 statement was used by the magistrate in concluding that the prosecution had proven its case. This was a misdirection on the part of the magistrate as she had taken into account evidence not proven by the prosecution but instead I

relied on contents of a s 112 statement given by the appellant during investigation.

[58] In the foregoing, this court is of the firm opinion that the magistrate had erred when she found that the prosecution had established a prima facie case. It would not have passed the test laid down in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321 and a host of other high authorities on the subject. The appellant ought to have been acquitted and discharged at the end of the prosecution case.

[59] This court is satisfied that based on the defective charge and the misdirection of the magistrate, it was sufficient for this court to arrive at the above decision. As such, counsel's argument on the applicability of s 79 of the Evidence Act 1950 does not require any consideration by this court.

[60] The bitter experience of having served eight months in prison before she was ordered to be released by this court would serve a reminder to her to be careful when befriending strangers especially when the encounter was made through social media.

[61] Order accordingly.

Appeal allowed.

Reported by Izzat Fauzan